

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 16, 2007

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: Docket No. 458-07-2827; Texas Alcoholic Beverage Commission v. Gary Bernard Wade D/B/A Omni Central Hall

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

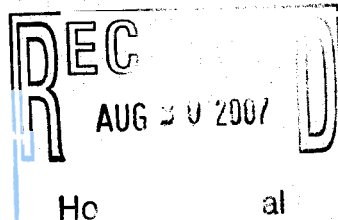
Sincerely,

A handwritten signature in cursive script, appearing to read "Roshunda Pringle".

Roshunda Pringle
Administrative Law Judge

RP/jh
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Sandra K. Patton, Attorney, Texas Alcoholic Beverage Commission, 420 West 20th, Suite 600, Houston, Texas 77008
VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
Gary Bernard Wade, d/b/a Omni Central Hall, 1927 Scott, Street, Houston, Texas 77003 -**VIA REGULAR MAIL**



DOCKET NO. 458-07-2827

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,**
Petitioner

V.

**GARY BENARD WADE
d//b/a OMNI CENTRAL HALL
TABC NO. 562438,**
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC, Petitioner) brought this action seeking forfeiture of the conduct surety bond posted by Gary Benard Wade d/b/a Omni Central Hall (Respondent). Petitioner requested that the bond be forfeited because Respondent engaged in conduct that is prohibited and/or in violation of the Texas Alcoholic Beverage Code resulting in a cancellation for cause of Respondent's permits. The Administrative Law Judge (ALJ) recommends forfeiture of Respondent's conduct surety bond.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. CODE ch. 5 and § 1 and 16 TAC § 33.24. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On May 15, 2007, Petitioner issued its notice of hearing directed to Respondent. On June 15, 2007, a hearing convened before SOAH ALJ Roshunda Pringle at 2020 North Loop West, Suite 111, Houston, Harris County, Texas. Petitioner was represented by Sandra Patton, TABC Staff Attorney. Respondent appeared and represented himself. The record closed on June 15, 2007.

II. DISCUSSION

A. Applicable Law

Pursuant to Code § 11.11, an applicant for a permit or a holder of a permit must file with the Commission a surety bond conditioned on the applicant's or holder's conformance with alcoholic beverage law. Pursuant to 16 TAC § 33.24, when a permit is canceled, or a final adjudication has been made that the permittee has committed three violations of the Code since September 1, 1995, the Commission must notify the permittee, in writing, of its intent to seek forfeiture of the bond. The permittee may request a hearing on the question of whether the criteria for forfeiture of the bond, as established by Code § 11.11, and 16 TAC § 33.24 have been satisfied.

B. Evidence

1. Petitioner's Evidence

Petitioner's exhibit was admitted at the hearing without objection. The exhibit included a copy of the permit, violation history, the conduct surety bond, and correspondence. On January 1, 2006, Petitioner issued to Respondent a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit and a Food Beverage Certificate (MB-550364, LB-550365, and FB-550366). These permits have been continuously renewed.

On September 15, 2006, Respondent signed and "Agreement and Waiver of Hearing" regarding the alleged prohibited conduct. In this agreement, the Respondent waived its right to a hearing to contest the Petitioner's claim that on August 20, 2003, Respondent, Mr. Wade, Respondent's agent, servant, or employee failed to answer, falsely or incorrectly answered a question or made a misleading statement in an original or renewal application or in connection with other written statements relating to the application to the commission, its officers, or employees. As of August 20, 2003, February 23, 2004, October 25, 2004, and February 9, 2005, five years had

not elapsed since the termination, by pardon or otherwise, of a sentence imposed on the applicant for the conviction or deferred adjudication of a felony. In this waiver, the Respondent acknowledged that the signing of the waiver could result in the forfeiture of any related conduct surety bond. This agreement became final and enforceable by the order signed by the Petitioner on September 20, 2006, finding that the Respondent violated the sections of the Code as stated in the "Agreement and Waiver of Hearing," and imposing the penalty reflected in that agreement. The Respondent did not appeal the waiver order.

2. Respondent's Evidence

Respondent testified at the hearing regarding the September 16, 2006, "Agreement and Waiver." Mr. Wade acknowledged that he signed the "Agreement and Waiver." He testified that his understanding of the agreement was that the parties were agreeing on the false statement allegation. He would have never signed an agreement regarding the previous conviction allegation.

According to Mr. Wade, at the time of the agreement, no one discussed with him that entering into the agreement would lead to the conclusion that the violations had been adjudicated or that his conduct surety bond would be forfeited since the agreement said "may be forfeited" and not "will be forfeited". Mr. Wade testified that had he known such to be the case, he never would have signed the agreement. He did not think that signing the agreement would result in the forfeiture of his \$5,000 bond.

Respondent also contends that the Commission made a mistake in issuing the permits because of his criminal history. His criminal background made him ineligible for the permit and the Commission should not have granted the permit. The \$5,000 bond would not be an issue if not for the Commission's mistake. If the Commission had not granted the permits he would not have paid the bond.

C. Discussion and Recommendation

As the holder of a mixed beverage permit, Respondent was required to provide a conduct surety bond, in the amount of \$5,000, payable to Petitioner. TEX. ALCO. BEV. CODE ANN. § 11.11 (a)(1). Petitioner may seek forfeiture of that bond if Respondent's permit is canceled for cause. 16 TAC § 33.24(j)

Petitioner provided evidence that Respondent engaged in conduct that is prohibited and/or in violation of the Code and/or TABC rules. The Respondent did not deny having a criminal history that made him ineligible to receive a permit/license. Respondent entered into an "Agreement and Waiver" regarding two separate violations of the code, both of which occurred on August 20, 2006. The agreement resulted in Respondent's permits being canceled for cause. A final order regarding these violations was issued by Petitioner on September 20, 2006.

Respondent argues that he did not realize that the violations would be considered as adjudicated when he signed the agreement. However, the September 20, 2006 order issued by Petitioner states that unless Respondent files a motion for rehearing, the order would become final and enforceable. The order was not appealed and became final which resulted in the violations being adjudicated. Respondent could have appealed the order yet chose not to seek a rehearing on the violations.

Furthermore, Mr. Wade testified that had he known that a result of his signing the agreement would be forfeiture of the conduct surety bond he never would have signed the agreement. He admitted at the hearing that he did sign the agreement which included the following language: "The signing of this waiver may result in the forfeiture of any related conduct surety bond." This statement put Respondent on notice that there was a possibility that Petitioner would seek forfeiture of the conduct surety bond. Respondent also admitted that he was represented by legal counsel before he executed the agreement.

The evidence on the record is sufficient to establish that Respondent, the holder of a mixed beverage permit, had his permit canceled for cause as a result of engaging in conduct prohibited and/or in violation of the Code and/or TABC rules. According to 16TAC § 33.24 (j) forfeiture of the conduct surety bond is the penalty for this violation. Therefore, the ALJ recommends that Respondent's conduct surety bond be forfeited.

III. FINDINGS OF FACT

Gary Benard Wade d/b/a Omni Central Hall (Respondent) holds a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Food Beverage Certificate (MB-550364, LB-550365, and FB-550366) issued by the TABC (Petitioner) for the premises located at 1927 Scott Street, Houston, Harris County, Texas.

- 2 Respondent posted a conduct surety bond. The bond is Texas Alcoholic Beverage Commission Conduct Surety Bond Number 3333000. Mr. Wade executed the bond as principal and SureTec Insurance Company is the Surety. The bond is in the amount of \$5,000 and is payable to the State of Texas.
- 3 On September 15, 2006, Respondent signed an "Agreement and Waiver" regarding allegations that the Respondent engaged in conduct prohibited and/or in violation of the Texas Alcoholic Beverage Code and/or TABC rules which occurred on August 20, 2006, and resulted in a cancellation for cause.
- 4 On September 20, 2006, Petitioner issued a Waiver Order canceling Respondent's permits for the two violations of the Texas Alcoholic Beverage Code as set forth in the signed "Agreement and Waiver".
- 5 Respondent did not appeal the Waiver Order.
- 6 Respondent engaged in conduct prohibited and/or in violation of the Code and/or TABC rules which occurred on August 20, 2006.
- 7 By letter dated February 28, 2007, Petitioner sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond.
- 8 Respondent requested a hearing to determine whether the conduct surety bond should be forfeited.


9. On May 15, 2007, Petitioner sent a notice of hearing by certified mail, return receipt requested, to Respondent's mailing address as listed in the Commission's records, informing Respondent of the date, time, and place of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
10. The hearing on the merits convened June 15, 2007, at the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas 77018, before ALJ Roshunda Pringle. Petitioner was represented by Sandra Patton, TABC attorney. Respondent appeared and represented himself. The record closed on June 15, 2007.

IV. CONCLUSIONS OF LAW

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.11 and 16 TEX. ADMIN. CODE (TAC) § 33.24.

2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, 1 TAC (TAC) § 155.55 and 16 TAC § 37.3.
4. Respondent engaged in conduct prohibited and/or in violation of the Code and/or TABC rules which occurred on August 20, 2006, and resulted in a cancellation for cause.
5. The conduct surety bond posted by Respondent should be forfeited. TEX. ALCO. BEV. CODE ANN. § 11.11 and 16 TAC § 33.24 (j).

SIGNED August 16, 2007.



ROSHUNDA PRINGLE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS